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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
Appellant,

VS.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ANSWER BRIEF FOR THE STATE OF NEW MEXICO, ET AL.

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OPINION BELOW

The opinion of the three-judge court is not yet reported, and appears at App. A, pp. 1a-6a.

JURISDICTION

Appellees (hereinafter, "the State") are satisfied with Appellant's (hereinafter, "the Secretary") presentation of the jurisdiction of this Court, which jurisdiction is not questioned by the State.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The State is satisfied with the Secretary's presentation of statutes and Constitutional provisions involved, but would add the following additional:

1. The 10th Amendment of the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

2. 47-23-1 New Mexico Statutes Annotated provides:

> "Short Title—Purpose. This Act (47-23-1 to 47-23-7) may be cited as 'The Livestock Board Act'. The Livestock Board Act shall be liberally construed to carry out its purposes which are to promote greater economy, service and efficiency in the administration of the laws relating to the livestock industry of New Mexico. (1973 Pocket Supp.)"

3. 47-23-6 New Mexico Statutes Annotated provides in part:

> "Additional Powers of the Board. . . . the New Mexico Livestock Board shall have the following powers:
>
> (1) To exercise general regulatory supervision over the livestock industry of this State in order to protect the industry from theft and contagious or infectious diseases and in order to protect the public from diseased or unwholesome meat or meat products; . . . (1973 Pocket Supp.)"

QUESTIONS PRESENTED

I. Whether the three-judge court correctly held that the Wild Free-Roaming Horses and Burros Act is in excess of the power of Congress under the Property Clause of the United States Constitution, and that the Act may not be sustained as an exercise of the power of Congress under the Commerce Clause of the Constitution.

II. Whether the Act infringes on the sovereignty, legislative authority and Police Powers of the State as attested to by the 10th Amendment of the United States Constitution, and intrudes on the State's trustee powers over resident wild animals.

STATEMENT OF THE CASE

The State deems it necessary to include its own Statement, for purposes of clarification and to set forth certain matters omitted by the Statement of the Secretary.

The Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340 (J.S. App. F., pp. 14a-20a), in addition to asserting exclusive jurisdiction, control and complete regulatory powers over the subject animals, also attempts to regulate non-public lands and in addition any unbranded, unclaimed horse or burro that comes into contact with public lands.[1]

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1. 16 U.S.C. 1322(2)(b) defines wild free-roaming horses and burros to mean "all unbranded and unclaimed horses and burros on public lands of the United States", regardless of when or for what duration such animal may come in contact with public lands. 16 U.S.C. 1334 extends the Act to include regulation of wild horses and burros on State and private lands. Subdivisions (2) through (6) of Section 8 of the Act (16 U.S.C. 1338) are not limited to the public lands, but apply absolute and complete jurisdiction over the subject animals wherever they may be within the United States.

The burros which are the subject of this litigation were in fact freely roaming upon private, State and federal lands, spending the majority of their time on private land (App. 44-46); although at the moment of capture the animals apparently were on BLM lands.

The Act does not expressly claim true property ownership of the animals, and makes no provision for condemnation of the animals, despite the Act's contradictory claim of broad and sweeping powers of dominion, jurisdiction, control and regulation of the animals, tantamount to ownership.

The Act requires the Secretary to remove the animals from private lands upon notification to the Secretary by the private landowner (16 U.S.C. 1334), but the Secretary in this case failed and refused to remove the subject burros upon such notification (App. 48-49; App. 54-55; p. 2 of the Memorandum Opinion below, J.S. App. A., p. 2a; State's Exhibit 5, App. 33-34, 74-78).

The Act makes no provision for compensation for the extensive property damage upon State and private lands, and to State and private interests, caused by the wild free-roaming horses and burros (App. 49-51; 58-59).[2]

The Act and its legislative history do not make any express finding regarding, nor any reference to, interstate commerce, or any burden or effect thereon. The court below, therefore, held that the Act was not based upon and cannot be sustained as an exercise of Congressional au-

2. See also, Protection of Wild Horses on Public Lands, Hearings on H.R. 795, H.R. 5375 and Related Bills before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess., 64, 69, 73-74, Testimony of the Chief of the United States Forest Service, stating that wild free-roaming horses and burros are particularly destructive of the range, consume feed supplements placed out by private individuals for livestock operations, etc.

thority under the Commerce Clause (J.S. Statement, App. A., pp. 5a-6a). The court properly held that Congress grounded the Act upon the Property Clause of the Constitution (*Id.*, 3a).

The court below conducted an evidentiary hearing at which testimony and other evidence was presented, for presentation of the facts giving rise to this litigation (App. 24-89). The Secretary declined to introduce any evidence at that hearing (App. 60), and now seeks to create a record in this Court by extensive reliance upon the testimony of proponents of the Act during hearings on the Bills, and by reference to a hearing held subsequent to enactment of the Act (Brief for the Secretary, pp. 4-5).

Upon review of the legislative history of the Act and the evidence submitted to the court below, it appears that a basic fact upon which the Act is grounded is erroneous and fails to exist: ". . . that these horses and burros are fast disappearing from the American scene". 16 U.S.C. 1331. The animals in fact proliferate very rapidly (App. 28, 59). Prior to and at the time of passage of the Act, the population of the animals was and has remained stable (or was and is increasing).[3] Prior to passage of the Act, the Bureau of Land Management said that there was, in fact, a need to reduce the population of the subject animals.[4]

The Report to Congress by the Secretary of the Interior and the Secretary of Agriculture, as indicated by the Secretary at p. 5 of his Brief, states that the wild free-roaming horses and burros are not vanishing breeds.

3. Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra*, note 2, at 7, 32, 65, 128, 140.

4. Protection of Wild Horses and Burros on Public Lands, Hearings on S. 862, S. 1116, S. 1090, and S. 1119 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess., 46 (1971).

At page 5 of the Statement, and again at p. 10 of his Brief, the Secretary sets forth statistics regarding numbers of remaining wild horses and burros. Again, the evidence introduced below, and in the legislative history, indicates that not only is the population of the subject animals stable or increasing, as set forth above, but that the foregoing statistical evidence is, if not incorrect, at least highly speculative.[5]

The potentially destructive nature of these animals was recognized and dealt with by the Department of Interior itself (Forest Service and Park Service) in March, 1975, when these agencies caused to be destroyed 50 wild

5. The Secretary refers to "85 burros" in New Mexico, Brief for the Secretary at p. 5; and, that less than 10,000 wild horses remain in the entire United States, at note 12, Brief for the Secretary, at p. 10. See, *contra*, Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra*, at 140 (25,000 wild horses in United States), at 7 (17,000), at 128 (15,000 in the State of Nevada alone). And see also, testimony of the Director of the New Mexico Livestock Board in the court below, indicating 5,000 of the subject animals in New Mexico alone, 700 or 800 of which are burros (App. 27, 39). Since 34% of the lands of the State of New Mexico are subject to the Wild Horse Act (Appendix to the June, 1974 Inventory Report on Real Property Owned by the United States Throughout the World, prepared by the General Services Administration, GS 1.15, 1974, 559A), and because these lands are interspersed throughout the State without, for the most part, separation from private or State lands by fencing (App. 44-46, 48, 55), it is apparent that all 5,000 of these New Mexico animals (and all 700 or 800 burros) must be presumed to be within the Act because they may have at one time set foot upon federal lands. The Secretary's note 4 at page 5 of the Brief for the Secretary, indicating that the burros are not subject to federal protection under the Act, is therefore questionable. See also, "Effects of Livestock Grazing on Wildlife, Watershed, Recreation, and Other Resource Values in Nevada," U.S. Department of Interior, Bureau of Land Management, February 1975, at 35-36 (25,000 of the subject animals are in the State of Nevada alone); and, Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra*, at 34, 128-129, stating that the BLM estimates of the animals are inaccurate and the animals are extremely difficult to count; and, Report to Congress by the Secretary of Interior and the Secretary of Agriculture on Administration of the Wild Free-Roaming Horse and Burro Act (June 1974), at 2, stating that the "estimates are open to question".

free-roaming burros upon public lands (Affidavits of Pat Archuleta and Roy G. Gibson, not included in the Appendix herein but in the court record below). There is no evidence in the record herein or in the legislative history of the Act which indicates similar action was ever taken by the State of New Mexico or its citizens.

The State sets forth the foregoing legislative history and three-judge court evidence simply to establish that the Act is based on a legislative declaration of facts which does not exist and which did not exist at the time of passage of the Act; and, to indicate the speculative and questionable nature of the statistics regarding these animals.

The Wild Free-Roaming Horses and Burros Act makes no provision for the prevention or control of disease by and among the subject horses and burros, and the spread of such disease among the livestock industry of this State. The Wild Horse Act prevents the State from protecting its citizens and industry from this evil.

SUMMARY OF ARGUMENT

The State, by its Motion to Dismiss or Affirm previously submitted herein, briefed the merits of this case. The State will attempt to avoid repetition of that brief as much as possible, and respectfully requests the Court to refer thereto for points and authorities not repeated herein. The State by this brief will attempt to answer the points and authorities discussed by the Secretary in his Brief in Chief, and to raise certain new points and authorities not previously briefed by the State's Motion.

The decision of the three-judge court should be affirmed, and the Wild Free-Roaming Horses and Burros Act held unconstitutional.

At pp. 12-13 of his Brief, the Secretary sets forth isolated portions of sentences from previous opinions of this Court as supporting the proposition that Congress' entrusted powers over the public lands is absolute and without limitation, and, that this Court may not say how that trust shall be administered. The Secretary does not mean to imply that this Court may not judicially review Acts of Congress? *Marbury* v. *Madison*, 1 Cr. 137. The issue before this Court calls not for a determination of how or the manner in which a "trust" shall be administered, but rather, whether Constitutional authority exists for Congress to enter into administration of this matter in the first instance. It *is* for this Court to say whether the *subject* of the Act is a proper subject of federal legislation; it *is* for this Court to say whether the Act exceeds the powers of Congress under the United States Constitution; and it *is* for this Court to say whether the Act infringes on powers remaining with the States.

The Secretary does not assert that the lands which are the subject of the Act—all BLM and U. S. Forest Service lands—have been ceded to the federal government by the states; the federal government thereby obtaining absolute and exclusive jurisdiction, dominion and control over the lands by consent of the states. However, should this Court concede the extravagant views of federal power entertained by the Secretary and necessary to the Wild Horse Act, cession by the states of federally-owned lands within their borders would no longer be a prerequisite to such absolute and exclusive federal power over these lands. State laws such as brand inspection laws, animal disease control laws, fish and game laws, estray laws, and even the control of the State over its citizens on federally-owned lands in matters of general criminal and civil law could be taken away and denied the states under the pre-

tense of absolute federal power over federal lands within the State.[6]

On the contrary, federal lands within the borders of the western states are not totally exempt from state legislative and police authority, and the rights of state sovereignty. Every state, upon admission to the Union, acquires general jurisdiction, civil and criminal, for the preservation of public order and for the protection of persons and property throughout the limits of the state, except where the state has ceded exclusive jurisdiction of certain parcels of land to the United States. *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 167; *Wilson* v. *Cook*, 327 U.S. 474, 487-489.

There is no specific delegation of power to Congress to enact the Wild Horse Act; the Act is not a proper exercise of a Constitutional grant of power, upon which every acquisition, holding or disposition of property by the federal government depends. *United States* v. *Allegheny County, Pa.*, 322 U.S. 174.

The State submits that it is for this Court to determine whether the subject animals are a part of the federal soil and thus within the powers of Congress under the Property Clause; or, whether the Act can be sustained as a valid exercise of Congress' powers to protect its lands from damage. The State submits that these questions must be answered in the negative, and that the Act in-

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6. Reference is made to the tables set forth at Appendix A of the Brief of Amicus Curiae, State of Idaho. The federal powers necessary to the Wild Horse Act and claimed by the Secretary in his Brief would reduce the acreage of the State of Alaska by 96.4%; Arizona, by 43.9%; California, by 45%; Colorado, by 36%; Idaho, by 63.7%; Nevada, by 86.5%; Oregon, by 52%; Utah, by 66%; Wyoming, by 48%; and this State, by 33.6%. The United States House of Representatives and the United States Senate would constitute the executive body—the "state legislature"—with regard to these lands "lost" by the western states.

fringes upon the legislative, political and police authority of the states with regard to non-ceded federal lands within state borders. The trustee powers referred to by the Secretary in his Brief rest with the states, unless this Court should now distinguish or overrule its line of decisions holding such trustee ownership powers over resident wild animals to be in the states. *Geer* v. *Connecticut*, 161 U.S. 519; *Lacoste* v. *Department of Conservation*, 263 U.S. 545.

The Act itself and its legislative history fail to make any express reference to "interstate commerce", nor does Congress make any finding, expression of intent, or statement of purpose regarding interstate commerce or any burden or effect thereon. The three-judge court correctly found that the Commerce Clause was not at issue in the case. The Secretary's *post hoc* litigation attempts to raise the Commerce Clause as an issue herein should not be given weight. The legislative history discussed by the Secretary in his Brief does not indicate any reliance by Congress on the Commerce Clause and is inapplicable to the issue. There is no evidence or reference to interstate commerce or any burden or effect thereon in the record herein. The Act itself expressly relies on the powers of Congress over the public lands.

The three-judge court should be affirmed because the Wild Horse Act is based on a legislative declaration of facts that did not exist at the time of consideration and passage of the Act and which does not exist at this time. *Leary* v. *United States*, 395 U.S. 6, 38; *Block* v. *Hirsh*, 256 U.S. 135, 154-155. This Court may examine such facts when legislation is defective on this ground. *Leary, Block, supra*. The legislative history and the evidence introduced in the court below indicate that the population of the subject animals is and has been stable, or is increasing, contrary to the fact upon which the Act expressly grounds

itself: That the subject animals are "fast disappearing from the American scene" (16 U.S.C. 1331). The Act's purpose, and the reason for its enactment, is to prevent the animals from so disappearing.

The State will not herein brief the issue regarding the infringement of the Wild Horse Act upon individual rights and freedoms guaranteed by the United States Constitution. Previous rulings by this Court would perhaps preclude a state from raising, on its own behalf, a violation of such individual rights and freedoms. However, as trustee owner of the subject animals, and because of the State's great interest in the welfare and constitutional rights of its own citizens, the State would show the Court that the Wild Horse Act makes no provision for compensation for the damage caused by the subject animals. This damage occurs on private, state and federal lands, not only to the land itself but to various interests, industries, and persons thereon, and to the State's other resident wild animals. Insofar as the State's lands and other resident wild animals are concerned, the State raises this argument on its own behalf.

The State, by its trustee powers over the subject animals, and under the police powers upon which the Estray Laws of the State are grounded, has authority to grant title and ownership of the subject animals to the citizens of the State. The Secretary acting under the Wild Horse Act then seizes this property from the individual citizens with no provision in the Act for condemnation of the property or compensation therefor.

The extreme federal powers asserted by the Act—that any animal which however briefly may contact federal lands becomes a "federal animal"—have never previously been claimed by Congress nor sustained by this Court.

Even should this Court find Congress to have the power to regulate the subject animals on federal land, the Act unconstitutionally extends its terms to include regulation on state and private lands. The Property Clause powers cannot extend beyond the federal lands in this manner.

The Act makes no provision for controlling or preventing the spread of disease by and among the subject animals, and the spread of such disease to other animals within the State. This is a matter of purely local concern, and constitutes an evil which, under the United States Constitution, should be dealt with by the State under its police powers. By infringing on this area of purely local concern, the Wild Horse Act intrudes upon the local sovereignty and legislative authority of the state, endangering not only the livestock industry and other animals within the state, but also the health and welfare of its citizens.

While the 10th Amendment has been characterized as a "truism", stating merely that all is retained which has not been surrendered, this Court has recently held that the 10th Amendment is not without significance; the Amendment expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the states' integrity or their ability to function effectively in a federal system. *Fry* v. *United States*, ... U.S. ....., at ....., n. 7, 95 S.Ct. 1792, 1795.

This Court, contrary to the claim of power asserted by the Secretary, has ample power to prevent the utter destruction of the State as a sovereign political entity. The Wild Horse Act and any similar extension of the extravagant federal powers necessarily exercised thereby will inevitably cause this destruction, by ousting all sovereignty, control, dominion, legislative authority and police power of the western states over the federal lands within

their borders. In practical effect, the western states will have been drastically reduced in size. Congress by the Wild Horse Act is now declaring that the western states were not in fact admitted into the Union on an equal footing with the original states in all respects whatever, as originally declared by the acts admitting these states into the Union.

ARGUMENT

I. Whether the Three-Judge Court Correctly Held That the Wild Free-Roaming Horses and Burros Act Is in Excess of the Power of Congress Under the Property Clause of the United States Constitution, and That the Act May Not Be Sustained As an Exercise of the Power of Congress Under the Commerce Clause of the Constitution.

Congress by enactment of the Wild Horse Act has unconstitutionally attempted to exercise powers not granted by the Property Clause of the United States Constitution. Congress has no power to legislate in the absence of a specifically enumerated power granted Congress by the provisions of the Constitution itself. *Afroyim* v. *Rusk*, 387 U.S. 253, 257. The authorities discussed by the Secretary at pp. 12-13 of his Brief shed no light on the issues to be determined herein. The animals which are the subject of the Wild Horse Act are not "public land" and are not "public property entrusted" to Congress (*United States* v. *San Francisco*, 310 U.S. 16, 29, et al., at p. 12 of the Brief for the Secretary; *United States* v. *San Francisco, supra*, 310 U.S. at 30, at p. 13 of the Brief for the Secretary).

The subject animals do not issue from the soil comprising the public lands, as did the water power created by

a government dam and the electric energy thus produced, in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288; and *Utah Power and Light Co.* v. *United States*, 243 U.S. 389.

The Secretary's reliance upon the principles established by this Court in *Missouri* v. *Holland*, 252 U.S. 416, is misplaced in that the decision was based upon the federal treaty power as related to internationally migratory birds. There exists no federal treaty regarding the animals which are the subject of the Wild Horse Act, and there is no legislative history or evidence in the record below which indicates these animals to be internationally migratory. The legislative history and the evidence herein is to the contrary.[7] There is no Congressional finding nor any evidence to indicate that the Wild Horse Act is aimed at protecting federal lands from damage by the subject wild horses and burros. The statute is aimed at protecting the wild horses and burros, not the land upon which they live. Therefore, the decisions of this Court holding that the federal government may undertake reasonable steps necessary to protect its lands from injury, including injury caused by animals on such lands, are not authority to support the Wild Horse Act (*Hunt* v. *United States*, 270 U.S. 96, 100; *Camfield* v. *United States*, 167 U.S. 518, 524). This power is directed solely to the federal government's protection of its own lands (*Camfield, supra*, at 525-526).

This Court has stated that the Property Clause ". . . clearly does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the

7. Testimony of the Director of the New Mexico Livestock Board, App. 29; see also, Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra*, at 35, indicating the animals are non-migratory and remain in "small environmental niches".

United States within their limits." *Kansas* v. *Colorado*, 206 U.S. 46, 89.

The authorities discussed by the Secretary at pp. 12-19 of his Brief do not establish Congress' authority to claim exclusive possession and jurisdiction over, to completely regulate and control, and to assert full powers of dominion, including the right to destroy, the animals which are the subject of the Wild Horse Act. Nor do those cases establish a proprietary interest in the subject animals, such that the animals may be considered "property belonging to the United States". *Kansas* v. *Colorado, supra*. Those cases do not establish the extreme federal power to denote an animal as a "federal animal", or subject the animal to exclusive and complete federal jurisdiction and control, solely upon the basis of a momentary contact of the animal with federal land. On the contrary, those cases must be limited to their factual context—that is, the conditions which Congress may impose upon the *disposal* of federal lands, or the *protection* of federal lands.

Those cases certainly do not extend the terms of the Property Clause so as to enable Congress to enact a statute which also operates upon and regulates private and State lands (16 U.S.C. 1333, 1334, 1338).

Quite simply, horses and burros do not constitute real property, such as the riparian and mineral rights at issue in *Ashwander*, and *Utah Power and Light, supra*. The animals cannot possibly be considered "property belonging to the United States", as set forth by the Property Clause. Nor is it possible to deduce from the Property Clause the crucial conclusion reached by the Secretary at page 13 of his Brief—that the power to regulate and protect wildlife living on public land necessarily follows therefrom. The State can present this Court with no authority in support

of such a conclusion, and the Secretary cites no authority in support thereof. If it is possible to hold any kind of proprietary or regulatory rights in wild animals, such rights have consistently been held by this Court to exist in the State, as *trustee* owner of the subject animals. *Geer* v. *Connecticut*, 161 U.S. 519; *Lacoste* v. *Department of Conservation*, 263 U.S. 545.

Congress has not previously attempted to so extend its powers under the Property Clause. The Secretary in his Jurisdictional Statement and the State in its Motion to Dismiss discuss various other federal statutes regarding animals. Each of the Acts mentioned by the Secretary is self-cleansing and constitutionally sound, and each such Act will remain unaffected should this Court affirm the judgment below (note 4, the State's Motion to Dismiss or Affirm, at pp. 15-16). With the exception of the Wild Free-Roaming Horses and Burros Act, Congress has meticulously observed the constitutional powers of the states and the constitutional limitations placed on the federal government with regard to resident wild animals, and with regard to non-ceded federal lands within the states' borders.

The overall thrust of the Secretary's Brief is that the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the states. If the Secretary's premise be accepted, the states (and in particular, the western states) will have been admitted into the Union not as equal members, but as states shorn of a legislative power vested in the original states of the Union, a power resulting from the fact of statehood and incident to its very existence. Every isolated piece of land belonging to the United States would be exempt in this regard from the authority of the State.

Ward v. *Race Horse*, 163 U.S. 504, 514. In effect, this construction of the Property Clause would substantially reduce the size of most of the western states.[8]

This Court, mindful of the place of the States in our Constitutional system, the limitations placed upon the federal government by the Constitution, and the powers of local sovereignty, and legislative control inherent in the states, has resolved close cases in favor of a continuing power on the part of the states to legislate in their customary fields. *South Carolina* v. *United States*, 199 U.S. 437; *Federal Compress and Warehouse Co.* v. *McLean*, 291 U.S. 17; *Townsend* v. *Yeomans*, 301 U.S. 441; *Oregon* v. *Mitchell*, 400 U.S. 112; *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261.

The sovereignty and legislative authority of the States with respect to these federal lands, and the trustee powers of the States regarding the animals themselves, will be discussed at Point II, following.

The three-judge court correctly found that the Wild Horse Act cannot be sustained as an exercise of the power granted Congress by the Commerce Clause. The commerce powers are, quite plainly, not at issue herein. The Wild Horse Act, the findings and preamble thereto, and the legislative history fail to make any reference to or finding regarding the commerce powers, interstate commerce, or any burden or effect thereon. The record herein discloses

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8. The percentage of land owned by the federal government is set forth in the 1974 Inventory Report on Real Property Owned by the United States Throughout the World, prepared by the General Services Administration, G.S. 1.15, 1974, 559A, reproduced in the Appendix to the Brief of Amicus Curiae, State of Idaho. With reference to the western states, the tables indicate federal ownership to be: Alaska—96.4%; Arizona—44%; California—45%; Colorado—36.1%; Idaho—63.7%; Montana—29.6%; Nevada—86.5%; New Mexico—33.6%; Oregon—52.3%; Utah—66.2%; Washington—29.5%; Wyoming—48%.

no evidence of commerce among the states or a burden on such commerce. The Act is expressly grounded on the Property Clause powers, and considers the animals to be a part of the public lands.

Because of the failure of the United States to establish a minimal record below (App. 60), and because of the total absence of any mention of interstate commerce or the commerce powers by the Act itself and its history, the Secretary now relies upon a *post hoc* litigation strategy to create a Commerce Clause issue. The Secretary attempts to do so by gleaning isolated portions of the testimony taken during the hearings conducted by the House and Senate prior to passage of the Act (Brief for the Secretary, pp. 20-23).

The Secretary's extensive reliance upon the legislative history overlooks a well established principle of statutory construction: That the language employed in the statute is the foremost guide to legislative intention. *United States* v. *American Trucking Associations,* 310 U.S. 534, 543, n. 18; *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 390-95; *United States* v. *Oregon,* 366 U.S. 643, 648. The three-judge court's review of the Act led it to correctly conclude that ". . . the Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute. This argument must fail." (J.S. App. A., pp. 5a-6a). The Act expressly relies on the powers of Congress over the public lands, and makes absolutely no reference, ambiguous or otherwise, to interstate commerce or any effect or burden thereon.

With regard to the Secretary's frequent citation of the hearings, this Court has said that such remarks during the course of legislative *hearings* are not treated as significant expressions of legislative intention. *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 125; *United States* v.

United Mine Workers, 330 U.S. 258, 276-277; *McCaughn* v. *Hershey Chocolate Co.,* 283 U.S. 488, 493-494 and cases cited.

Moreover, the particular portions of the legislative history relied upon by the Secretary do not sustain the contention that the Act is based upon the Commerce Clause or derives any powers therefrom.[9]

For example, the Secretary states that the legislative history discloses certain "connections" with interstate commerce (Brief for the Secretary, at p. 21), as seen by testimony that wild free-roaming horses and burros are objects

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9. The Secretary states at p. 21 of his Brief that the subject animals do range across state lines, and that Congress "was well aware of this", and a Senate hearing citation is given. Even assuming that the subject animals do range across state lines, that clearly does not establish "commerce among the states". And, the fact that Congress was "made aware" of a fact from testimony given in hearing certainly does not show that the Act itself is based upon the Commerce Clause, and Congress made no such finding. With reference to the specific citations, Protection of Wild Horses and Burros on Public Lands, Hearing on S. 862, S. 1116, S. 1090, and S. 1119 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess., 45, 52, 61 and 63 cited by the Secretary, it is noted that: Page 45 of the hearing citation makes no mention of migration, interstate or otherwise; p. 61 of the hearings refers to a few horses "near a border", but makes no mention of interstate migration; p. 63 of the hearings makes no mention of migration, interstate or otherwise. The foregoing citations from the Senate hearing make no mention of interstate commerce, or commerce of any nature. The only evidence introduced on the subject in the court below indicates that the animals are non-migratory and remain in a quite small environmental area (App. 29); Bureau of Land Management testimony before the House indicates the animals remain in small environmental niches, note 7, *supra.* Even assuming that some interstate migration occurs, such interstate movement alone is insufficient to sustain Congress' power to regulate the animals under the Commerce Clause. There is no evidence, legislative history or finding of Congress that such interstate movement (assuming such occurs) has any impact on interstate commerce or on commerce in general, or that such movement constitutes interstate commerce in and of itself. Even should such migration be considered an effect on commerce, such trivial impact on commerce may not be used as an excuse for this broad general legislation. *Maryland* v. *Wirtz,* 392 U.S. 183, 196-197, n. 27.

of interest to amateur students of nature and professional scientists, who travel in interstate commerce to observe and study them. These citations of legislative history pertain solely to hearings conducted by Congress; Congress made no findings pertaining thereto and the Act fails to mention any such effect on interstate commerce.[10]

The Secretary, recognizing the absence of any Congressional findings or express provision within the Act itself pertaining to the Commerce power, or to interstate commerce, argues that such an express finding or statutory language is unnecessary to sustain the Act under the Commerce powers. The Secretary makes reference to *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 252-253. The opinion supports the State's position herein. It is irrelevant that Congress did not formally invoke the Commerce Clause by Congressional findings, because the Act at issue in *Heart of Atlanta Motel, Inc.* itself explicitly relied on the commerce powers and invoked those powers. As stated by this Court in that case:

> "Since the Commerce power was not relied on by the Government (discussing an older Supreme Court case)

10. This legislative history, n. 22, Brief for the Secretary, at p. 21, pertains not to the substance of the testimony but rather to the identity of the person giving the testimony. The citations concern the testimony of various scientists, college students, and by Mrs. Velma Johnston, another proponent of the Wild Horse Act. No mention is made at any point in the cited testimony of "traveling in interstate commerce". Because the scientists made a study of the subject animals and testified regarding that study in support of the bill, the Secretary presumes that the scientists (or college students) must have traveled in interstate commerce to make the study. Congress did not so find, and the legislative history does not so state. It would be absurd to suggest that a scientific study made in preparation for testimony in support of a bill constitutes a "Commerce Clause" underpinning for the bill itself. If such an argument were accepted, this Court could sustain any Act of Congress as a proper exercise of its powers under the Commerce Clause, upon a showing by the government that witnesses testifying at the hearings in support of the bill traveled in interstate commerce in order to get to Washington, D. C. to testify.

> and was without support in the record it is understandable that the Court narrowed its inquiry and *excluded the Commerce Clause as a possible source of power.* . . . We, therefore, conclude that the Civil Rights cases have no relevance to the basis of decision *here where the Act explicitly relies upon the Commerce power,* and where the *record is filled with testimony of obstructions and restraints* resulting from the discriminations found to be existing." 379 U.S. at 252 (Emphasis added).

The Act at issue in *Heart of Atlanta,* by its express terms, was carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people. Congress expressly, by the terms of the Act itself, relied upon the commerce power. This Court simply held that Congress may invoke the Commerce Clause by the terms of the Act itself, rather than make formal Congressional findings of interstate commerce prior to passage of the Act. In addition, this Court in the *Heart of Atlanta* case, and in *Katzenbach* v. *McClung,* 379 U.S. 294, made specific reference to a Congressional record "replete with evidence of the burdens" and effects on interstate commerce. The Act which was the subject of this Court's decision in *Perez* v. *United States,* 402 U.S. 146, cited by the Secretary in support of this proposition, contained express provisions pertaining to interstate commerce, and Section 201(a) of Title II of the Act contained the following explicit findings by Congress: "(1) Organized crime is interstate and international in character. . . . (3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."

In each of the decisions of this Court cited by the Secretary in support of his suggestion that the Wild Horse Act is based upon the Commerce Clause, the Act construed by the Court in those cases was sustained upon at least two of the following grounds:

1. The Act itself expressly relied upon the Commerce Clause and referred to either the commerce powers or to interstate commerce (*Perez*; *Heart of Atlanta*; *Katzenbach*);

2. The Act contained express findings indicating reliance by Congress on the Commerce Clause (*Perez*); and,

3. The record of the passage of the Act through each House was replete with evidence of the burdens and effects upon interstate commerce (*Heart of Atlanta*; *Katzenbach*).

Congress made no findings indicating reliance on the Commerce Clause during passage of the Wild Horse Act; the Wild Horse Act fails to make any express reference to the commerce powers or to interstate commerce; the record in this case and the record of the passage of the Wild Horse Act through each House contain no evidence of any burden upon interstate commerce and make no express reference to interstate commerce or the commerce powers. We fail to see the applicability of the decisions of this Court in *Perez, Heart of Atlanta* and *Katzenbach, supra,* except insofar as supportive of the State's position herein.

The Secretary is attributing to Congress a motive or Constitutional underpinning for the Act which fails to be disclosed by the legislative record, by the findings of Congress, by the Act itself, or by the record herein. Whatever trivial impact on commerce may be implied from some

of the testimony cited by the Secretary can certainly not be an excuse for the broad general regulation of state and private activities inherent in the Wild Horse Act. *Maryland* v. *Wirtz*, 292 U.S. 183, 196. The legislative history discussed by the Secretary falls far short of disclosing a "close and substantial relation to interstate commerce" as the foundation for the Wild Horse Act. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U.S. 453, 466; *Maryland* v. *Wirtz, supra,* at 196.

The Secretary at p. 22 of his Brief discusses the word "Commercialization" used by the House Committee in H.R. Rep. No. 92-480. The Committee was concerned with human exploitation of the animals and not interstate commerce. The Committee makes no mention of the commerce powers or of any burden on interstate commerce, or any effect on commerce. The commerce power cannot come into play where such commercial act does not occur in, affect or burden interstate commerce, particularly where Congress fails to make any finding, statutory provision, or legislative record regarding such burden or effect on interstate commerce. The subject of federal power is still commerce, and not all commerce but commerce with foreign nations and among the several states. *Maryland* v. *Wirtz, supra,* at 196.

It is true that Congress exhibited a concern for the welfare of the wild horses and burros in the reports cited by the Secretary; but it is clear that Congress subsequently attempted to resolve this by an explicit finding that the wild horses and burros were an integral part of the public lands and therefore subject to the regulatory powers of the Property Clause. The conclusion that Congress relied on the Property Clause and not the Commerce Clause is inescapable. It is repeatedly stated throughout the Congressional record that the intent and primary purpose of

the Act was the protection of wild horses and burros from man; and this was to be accomplished by considering the animals an integral part of the natural ecological system of the public lands (S. Rep. No. 242, 92nd Cong., 1st Sess., at 1 (1971)).

II. Whether the Act Infringes on the Sovereignty, Legislative Authority and Police Powers of the State As Attested to by the 10th Amendment of the United States Constitution, and Intrudes on the State's Trustee Powers Over Resident Wild Animals.

Absent state consent by complete cession of jurisdiction of lands to the United States, exclusive jurisdiction does not accrue to the federal landowner with regard to federal lands within the borders of the state. As stated by this Court in *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650: "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal." (Emphasis added); see also, *Colorado* v. *Toll*, 268 U.S. 228.

The State and the other western states have made no such cession or consent with respect to the lands which are the subject of the Wild Free-Roaming Horses and Burros Act. The Act, therefore, infringes on the local sovereignty and legislative authority of the states, and on the states' powers inherent in their trustee ownership of resident wild animals.

In *Wilson* v. *Cook*, 327 U.S. 474, this Court upheld an Arkansas tax on the severance of timber from public lands

held by the United States as original owner (federal lands within the borders of the State of Arkansas). Portions of the Court's opinion refute the position taken by the Secretary herein:

> "Since the United States did not purchase the lands with the consent of the state, it did not acquire exclusive jurisdiction under the Constitutional provision, and *there has been no cession of the jurisdiction by the state*. (Omitting additional citations) . . . it follows that the state has retained its legislative jurisdiction, which it acquired by statehood, over public lands within the state, which have been included within the forest reserve.
>
> We conclude that the state has legislative jurisdiction over the federal forest reserve lands located within it, whether they were originally part of the public domain of the United States, or were acquired by the United States by purchase, . . ." 327 U.S. at 487-488 (Emphasis added).

Upon admission of a state to the Union, the state acquires sovereignty and political dominion over the federal lands within the state's borders; and with reference to such lands, the state has the same authority and jurisdiction which she could have exercised over similar property held by private parties. *Fort Leavenworth R. Co.* v. *Lowe*, 114 U.S. 525, 526.

As he must, the Secretary concurs at pp. 7-8 of the Jurisdictional Statement that the federal government has, with respect to non-ceded federal lands, the rights of an ordinary proprietor; and in the words of this Court *only* and *simply* that of an ordinary proprietor. *Paul* v. *United States*, 371 U.S. 245, 264. See also, *Sinclair* v. *United States*, 279 U.S. 263, 297; *Camfield* v. *United States, supra; Fort*

Leavenworth R. Co. v. *Lowe, supra; Alabama* v. *Texas,* 347 U.S. 272. The federal lands are subject to the legislative authority and control of the states equally with the property of private individuals.

The jurisdiction and legislative authority over the public lands, which upon admission to the Union is retained by the States, necessarily includes the power to regulate and control the wildlife living therein. *Geer* v. *Connecticut, supra; Lacoste* v. *Department of Conservation, supra.* As an *ordinary proprietor,* the United States is subject to the same game and fish laws and estray laws as any other private landowner—the laws of the State. *Camfield, supra; Fort Leavenworth R. Co.* v. *Lowe, supra; Sinclair* v. *United States, supra.*

In the case of *Colorado* v. *Toll,* 268 U.S. 228, the federal park service took a position similar to that taken by the Secretary herein, alleging that the Property Clause gave the United States full authority and power over all highways within Rocky Mountain National Park, to the exclusion of the State. This Court examined the legislation and determined that there was no attempt to give exclusive jurisdiction of the lands to the United States, ". . . but on the contrary the rights of the state over the roads are left unaffected in terms. Apart from those terms the state denies the power of Congress to curtail its jurisdiction or rights without an act of cession from it and an acceptance by the national government. . . . (omitting citations). The statute establishing the park would not be construed to attempt such a result. . . . As the defendant is undertaking to assert exclusive control and to establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed . . . . The cases cited for the defendant do not warrant any such extension of

the power of the United States over land within a state." 268 U.S. at 230-231.

Paraphrasing the Court above, there was no cession or consent by New Mexico giving exclusive jurisdiction to the United States of the federal lands which are the subject of the Wild Horse Act, and in the words of the Court, "on the contrary, the rights of the State over (wild horses and burros) are left unaffected in terms". The Wild Horse Act undertakes to "assert exclusive control and to establish a monopoly in a matter as to which (New Mexico) has not surrendered its legislative power". 268 U.S. at 231.

We believe it unnecessary for the Court to reach the matters discussed in Point II, since the Act is unconstitutional as an exercise of powers not delegated to Congress under the Property or Commerce Clauses. However, the intrusion of the Act upon the sovereignty of the states, including the intrusion of the Act upon the legislative authority and political jurisdiction retained by the states over non-ceded federal lands within their borders, provides an independent basis for affirming the court below. Adequate constitutional ground for the decision below also exists in the sovereign powers of the states inherent in their trustee ownership of resident wild animals.

The State submits that this inherent trustee power over resident wild animals supports the decision below on two grounds: The subject of the Act is a matter which is necessarily included within the states' legislative authority and political jurisdiction over non-ceded federal lands within state borders, and it is a matter as to which New Mexico has not surrendered its legislative power; and secondly, the Act's intrusion upon these inherent trustee-ownership powers and jurisdiction of the State, alone, supports the decision below.

"The wild animals within its borders are, *so far as capable* of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, *and in the exercise of its police power*, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein" (*Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549). "The adjudicated cases recognizing the right of the states to control and regulate the common property in game are numerous" (*Geer* v. *Connecticut*, 161 U.S. 519, 528). For this purpose the State represents its people (*McCready* v. *Virginia*, 94 U.S. 391, 394).

More recently, the Court has reaffirmed the continuing vitality of *Geer, Lacoste*, et al. by describing the foundation of the state powers with regard to wild animals as follows: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have the power to preserve and regulate the exploitation of an important resource." *Toomer* v. *Witsell*, 334 U.S. 385, 402.

Although not true technical ownership in the sense of a "titled" property interest, the state has consistently been held by this Court to have police powers, *trustee-ownership*, and the power to regulate and control these animals. It is precisely these trustee powers, police powers, and powers of regulation and control which are now claimed by the Wild Horse Act. When read as a whole, the Act goes even further by, in effect, claiming ownership of these animals without condemnation.

It has been intimated that the *Geer* doctrine is inapplicable herein because the subject horses and burros are not "wild animals" (Brief of Amicus Curiae International Assoc. of Game, Fish and Conservation Commissioners on the Merits, November 20, 1975). However, a committee

finding, not merely testimony taken during hearings, states that Congress did treat the animals as "wildlife". The House Committee expressly found, as follows: ". . . the Committee recognizes that they (the wild horses and burros) should not, in certain management practices, be considered any differently from other species more normally considered as 'wildlife' " (H.R. Rep. No. 92-480, 92nd Cong., 1st Sess. (1971), at page 5). Notwithstanding, the fact that such animals may be "quasi-wild" rather than "wild" is irrelevant insofar as Congress' surpassing its powers under the Property Clause, and Congress' infringing on state sovereignty and legislative authority. The Property Clause and the decisions construing it do not make or support any distinction between Congress' powers over "wild" animals as opposed to its powers over "quasi-wild" animals. No such distinction is supported by the 10th Amendment, nor by the opinions of this Court sustaining the inherent state legislative authority and political jurisdiction over non-ceded federal lands. For that matter, "quasi-wild" animals probably do come within the principles established by this Court in *Geer, Lacoste* and *Toomer*, et al. As found by the House Committee, the animals should not be considered any differently from other species normally considered as wildlife.

State legislative authority over the animals is also derived from its police power. "Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, *which is equally conclusive*. The right to preserve game flows from the existence in the State of a *police power* to that end. . . ." *Geer, supra*, 161 U.S. at 534 (Emphasis added). In the words of Justice Frankfurter, ". . . the State may for the common good exercise all the authority

that technical ownership ordinarily confers" in such animals. *Toomer, supra,* 334 U.S. at 408 (concurring opinion).

We would also submit that the legislative history of the Act and the evidence in the record herein show that the basic legislative declaration of fact upon which the Act is grounded is invalid, and does not exist, and did not exist at the time of consideration and passage of the Act. This Court has held that an Act of Congress is invalid if based on a legislative declaration of facts which fails to exist, and the Court in such cases has examined the facts to make that determination. *Leary* v. *United States,* 395 U.S. 6, 38; *Block* v. *Hirsh,* 256 U.S. 135, 154-155. The Act is based on a declaration that the subject animals are "fast disappearing from the American scene" (16 U.S.C. 1331). The purpose of the Act is to prevent the animals from so disappearing.

During the Committee hearings on the Act, and at the time of passage of the Act, the population of the animals was, in fact, stable, and has remained stable.[11]

The uncontroverted evidence before this Court indicates that the animals proliferate very rapidly; in fact, they may double their population every three years (testimony of Lee Garner, Director of the New Mexico Livestock Board, App. 28; testimony of Ruben E. Pankey, a member of the Public Lands Committee of the American National Cattlemen, immediate past Chairman of the Forest Committee and present member of the Legislative Committee of the American National Cattlemen, and Vice-Chairman of the Public Land Committee, New Mexico Cattlegrowers, App. 59).

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11. Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra,* note 2, at 7, 32, 65, 128, 140. The testimony at pp. 7 and 32 of the hearings indicates the population of the animals to be *increasing.*

The Secretaries of Interior and Agriculture reported to Congress that the wild free-roaming horses and burros are not vanishing breeds (Report to Congress by the Secretary of the Interior and the Secretary of Agriculture on Administration of the Wild Free-Roaming Horses and Burros Act, June, 1974).

And the Bureau of Land Management, reporting to the Senate Committee prior to enactment of the Act, stated that there was a need to *reduce* the population of the subject animals.[12]

The basic legislative declaration of fact upon which the Act is grounded did not and does not exist, and the Act is therefore invalid (the horses and burros are not "fast disappearing from the American scene") *Leary, Block, supra.*

The Act contains yet another constitutional defect. The legislative record and the uncontroverted evidence below establish that the subject animals: (1) Cannot peacefully coexist upon the same lands with domestic livestock, and often attack and injure domestic livestock on State and private lands, and on federal lands leased from the government under the Taylor Grazing Act (App. 49-51; 58-59); (2) the horses and burros are particularly destructive of the range, to the detriment of livestock and other wildlife.[13]

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12. Protection of Wild Horses and Burros on Public Lands, hearings on S. 862, S. 1116, S. 1090, and S. 1119 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess., 46 (1971).

13. Protection of Wild Horses on Public Lands, Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra,* note 2 at pp. 64, 69, 73-74. The testimony of the Chief of the United States Forest Service also indicates that the wild, free-roaming horses and burros consume commercial feed supplements purchased by private individuals. The Secretary can himself also attest to the

(Continued on following page)

Because of the mixed nature of the lands in the western States, unseparated by fencing or otherwise, the animals which are the subject of the Act are free to roam upon private, State and federal lands. That is the situation which gave rise to this litigation (App. 44-46, 48, 55; State's Exhibit 7, App. 45, 81; State's Exhibit 5, App. 33-34, 74-78).

As indicated by the legislative record and by the evidence introduced below, the subject animals can and do cause extensive property damage upon State, private and federal lands; not only damaging the lands but also private individuals, other wildlife within the State, and private industry. This damage will occur even if the Act is administered by the Secretary according to its terms. The Act makes no provision for compensation of the State or its citizens for these losses. In fact, as previously submitted hereinabove, the Act itself effectively accomplishes a taking without compensation (the subject horses and burros themselves).

The State submits that this Court may take judicial notice of the fact that the subject horses and burros, as any animal, are subject to contracting and spreading contagious or infectious diseases. The New Mexico Livestock Board was created to protect the citizens of this State from such contagious or infectious diseases among animals (47-23-1 and 47-23-6 N.M.S.A., reproduced *supra*, at page 2). The State, under its estray and other animal laws, and by authority of the United States Constitution, has the respon-

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Footnote Continued—

potentially destructive nature of these animals, as indicated by the March 1975 incident in which the Forest Service and Park Service found it necessary to destroy 50 wild free-roaming burros in Bandelier National Park (Affidavits of Pat Archuleta and Roy G. Gibson, not included in the Appendix herein but in the Court record below).

sibility and the inherent police power to regulate and control these horses and burros to prevent the damage discussed above, and to prevent the spread of contagious or infectious diseases by and among the subject animals. The State must have authority to prevent the spread of such disease from the wild horses and burros to the livestock industry, and to protect the life, health, welfare and property of its citizens.[14]

CONCLUSION

The decision below should be affirmed for the reasons stated above. The application of the Act to federal lands unconstitutionally exceeds the powers of Congress under the Property Clause. The Act by its express terms extends its exclusive jurisdictional and regulatory powers to private and State lands and interests. And as seen above, the Act necessarily has far-reaching and serious inherent effects on State and private interests, which effects occur both upon and beyond the federal lands. The Act thereby infringes on individual rights and freedoms and on the sovereignty, legislative authority and police powers of the states.

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14. In *Clason* v. *State of Indiana*, 306 U.S. 439, this Court upheld an Indiana statute regulating the transportation and disposal of carcasses of large animals not slaughtered for human food. The Indiana statute was upheld despite a contention by Mr. Clason (a private individual convicted under the Indiana statute) that the state law infringed upon the powers of Congress under the Commerce Clause and constituted a burden on interstate commerce. The Wild Horse Act does not seek to prevent or in any way regulate this spread of contagious or infectious diseases by or among the horses and burros, or the spread of such disease to the livestock industry or other animals within the State.

The State submits that should this Act be upheld, Congress will be free to claim exclusive jurisdiction and possession and the sole power to regulate, control or destroy any animal which may at any time touch upon the public domain, however briefly. The federal powers necessary to sustain the Act include civil and criminal jurisdiction over persons touching upon federal lands.

Much more than the subject horses and burros is at stake herein. The extravagant federal powers claimed by the Secretary and necessary to sustain the Wild Horse Act would completely abrogate and undermine *all* state laws insofar as the federal acreage within the State is concerned. This result includes non-ceded federal acreage, where the states have not consented to these exclusive federal powers and jurisdiction. The sovereignty and constitutional powers of the states and their citizens would have been dealt a severe blow. The authority of the State to protect the life, health and welfare of its citizens will be severely limited. Extensive damage to state and private interests will occur and will go uncompensated because of the failure of the Act to make provision therefor. The evils inherent in the Act will extend far beyond the federal lands.

The western states in particular will have been admitted into the Union not as equal members, but as states shorn of a legislative power vested in all of the other states in the Union, a power resulting from the fact of statehood and incident to its primary existence. *Ward* v. *Race Horse*, 163 U.S. 504. If, in the words of Justice White in the foregoing opinion, 163 U.S. at 514, ". . . every isolated piece of land belonging to the U. S. as a private owner would be exempt in this regard from the authority of the State," then the western states will have been reduced in size by

the acreage previously indicated herein (*supra*, at pp. 9 and 17), and Congress will become the state legislature as regards the public domain portions of those states.

The various other constitutional infirmities of the Act notwithstanding, perhaps its most serious defect is its ". . . exercise of power in a fashion which impairs the states' integrity or their ability to function effectively in a federal system". (*Fry* v. *United States*, ... U.S. ....., at ....., n. 7, 95 S.Ct. 1792, 1795). These rights of local sovereignty vest in the states and not in the United States. *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 167; *Barney* v. *Keokuk*, 94 U.S. 324.

This Court has ample power and constitutional authority to determine whether the powers of Congress in the enactment of the Wild Horse Act have been exercised in conformity to the Constitution, and to treat the Act as null and void. *Powell* v. *McCormack*, 395 U.S. 486. The Wild Horse Act is a dramatic intrusion upon traditional state sovereignty, jurisdiction and legislative authority, and seriously affects the federal-state balance established by the U. S. Constitution.

Because of the substantial interest of the western state *amici* in this litigation, the State respectfully requests the Court to give due consideration to the Brief filed herein by Idaho, Nevada, Wyoming, the Nevada Central Committee, the Nevada Board of Agriculture, the Duckwater Shoshone Tribe, and the Pacific Legal Foundation of California.

Should the Court decide to reverse the decision of the three-judge court, the State respectfully requests the Court to remand this cause to the three-judge court for determination of the State's Second Cause of Action, which was

not reached by the court below because of its ruling on the State's First Cause of Action.

Respectfully submitted,

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